

No. 12128

United States
Court of Appeals
for the Ninth Circuit

ALBERT ADELMAN,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

FILED

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PAUL R. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Defendant and Appellant.

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San Francisco, California.

In the United States District Court, Northern
District of California, Southern Division.

No. 30076-G

THE UNITED STATES OF AMERICA

vs.

ALBERT ADELMAN

INDICTMENT

Harrison Narcotic Act and
Jones-Miller Act

A true bill,

HAROLD C. CLOUDMAN,
Foreman.

Presented in open court and ordered.

Bail, \$3,500.00.

[Endorsed]: Filed March 20, 1946.

[1 *]

[Title of District Court and Cause.]

FIRST COUNT

(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557);

In the March, 1946, term of said Division of said District Court, the Grand Jurors thereof on their oaths, present that Albert Adelman, (whose full and true name is, other than hereinabove stated, to said Grand Jurors unknown, hereinafter called "said Defendant") on or about the 16th day of August, 1945, in the City and County of San Francisco, State of California, within said Division and District, unlawfully did sell, dispense and distribute not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium.

SECOND COUNT

(Jones-Miller Act, 21 U.S.C. 174)

And the said Grand Jurors, upon their oaths aforesaid, do further present; That at the time and place mentioned in the First Count of this indictment, in said Division and District, said defendant fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium in quantity particularly described as one 5-tael can of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

THIRD COUNT

(Harrison Narcotic Act, 26 U.S.C. 2553 and 2557)

And the Grand Jurors, upon their oaths aforesaid, do further present; That said defendant, on or about the 1st day of September, 1945, in the City and County of San Francisco, State of California, within said Division [2] and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a lot of smoking opium, in quantity particularly described as one 5-tael can of smoking opium.

FOURTH COUNT

(Jones-Miller Act, 21 U.S.C. 174)

And the said Grand Jurors, upon their oaths aforesaid, do further present; That said Defendant, at the time and place mentioned in the Third Count of this indictment, in said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of said lot of smoking opium in quantity particularly described as one 5-tael can of smoking opium, and the said smoking opium had been imported into the United States of America contrary to law, as said defendant then and there well knew.

/s/ FRANK J. HENNESSY,
United States Attorney.

Approved as to form:

RBMcM

[3]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 4th day of April, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

PLEA OF NOT GUILTY

This case came on regularly this day for entry of plea. The defendant Albert Adelman was present in proper person and with his attorney, Walter Duane, Esq., Reynold H. Colvin, Esq., Assistant United States Attorney, was present on behalf of the United States.

The defendant was called to plead and thereupon said defendant pleaded "Not Guilty" to the Indictment filed herein against him, which said plea was ordered entered.

After hearing Mr. Duane and Mr. Colvin, it is ordered that this case be continued to May 23, 1946, for trial. (Jury) [4]

District Court of the United States, Northern District of California, Southern Division.

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of June, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

MINUTES OF TRIAL: SENTENCE

This case came on regularly this day for trial. James T. Davis, Esq., Assistant United States Attorney was present on behalf of the United States. The defendant Albert Adelman was present in Court with his attorney, Walter Duane, Esq. Thereupon the following named persons, viz: Mabel E. Lange, Lena J. Jacobsen, George B. Whaley, Earle H. LeMasters, Marie Brown, Herbert C. McCormick, Frank Marisch, John W. Osborn, James R. Scott, Paola Benetti, William N. Ricks, Samuel D. McFadden, twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Davis made a statement to the Court and jury on behalf of the United States. Mr. Davis introduced in evidence and filed U. S. Exhibits Nos. 1 and 2. [5] G. E. Mallory, William H. Grady, Thomas E. McGuire and Jacob Leiberman were sworn and

testified on behalf of the United States. The United States then rested. Mrs. Albert Adelman and Albert Adelman were sworn and testified on behalf of the defendant, and the defendant rested. After argument by the attorneys and the instructions of the Court to the jury, the jury at 4:40 p.m. retired to deliberate upon its verdict. At 5:07 p.m. the jury returned into Court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict which was ordered filed and recorded, viz:

“We, the Jury, find as to the defendant at the bar as follows:

Guilty as to Count 1 of the Indictment
Guilty as to Count 2 of the Indictment
Guilty as to Count 3 of the Indictment
Guilty as to Count 4 of the Indictment

EARLE H. LeMASTERS,
Foreman.”

The jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Ordered that the jury be excused from further consideration of this case and from attendance upon the Court until notified.

Mr. Duane made a motion for new trial and motion in arrest of judgment, which said motions were ordered denied.

The defendant was called for judgment. After hearing the defendant and the attorneys, and said defendant having been now asked whether he has anything to say why judgment should not be pro-

nounced against him, and no sufficient cause to the contrary being shown or appearing to the Court It Is By the Court

Ordered and Adjudged that the defendant Albert Adelman, having been adjudged Guilty by the verdict of the jury, be [6] and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years on the First Count of the Indictment; and be imprisoned for the period of three (3) years on the Second Count of the Indictment, term of imprisonment imposed on the Second Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on the First Count of the Indictment; and be imprisoned for the period of two (2) years on the Third Count of the Indictment; and be imprisoned for the period of three (3) years on the Fourth Count of the Indictment, term of imprisonment imposed on defendant on the Fourth Count to commence and run from and after the expiration of the term of imprisonment on said defendant on the Third Count of the Indictment;

Further Ordered that the terms of imprisonment imposed on defendant on the Third and Fourth Counts run concurrently with those imposed on defendant on Counts One and Two of the Indictment.

Further Ordered that defendant pay a fine to the United States of America in the sum of One Hundred (\$100.00) Dollars on each of Counts Two

and Four of the Indictment, making a total fine of Two Hundred (\$200.00) Dollars.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a Federal Penitentiary. [7]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find as to, the defendant at the bar, as follows:

Guilty as to Count 1 of the Indictment

Guilty as to Count 2 of the Indictment

Guilty as to Count 3 of the Indictment

Guilty as to Count 4 of the Indictment

EARLE H. LeMASTERS,
Foreman.

[Endorsed]: Filed June 11, 1946.

[8]

In the District Court of the United States, Northern
District of California, Southern Division

No. 30076-G

UNITED STATES

vs.

ALBERT ADELMAN

JUDGMENT AND COMMITMENT

Criminal Indictment in Four (4) Counts for violation Harrison Narcotic Act, 26 U.S.C. 2553 and 2557; Jones-Miller Act, 21 U.S.C. 174.

On this 12th day of June, 1946, came the United States Attorney, and defendant Albert Adelman appearing in proper person, and with counsel and,

The defendant having been adjudged guilty of the offenses charged in the Indictment in the above-entitled cause, to wit: Viol. Title 26 U.S.C., Secs. 2553 and 2557, (Cts. 1 and 3) defendant did, on or about Aug. 16, 1945, and Sept. 1, 1945, sell smoking opium; Title 21 U.S.C., Sec. 174 (Cts. 2 and 4) defendant did, at above time and place, conceal lots of smoking opium, which had been imported into the United States of America, contrary to law and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General

or his authorized representative for imprisonment for the period of be imprisoned for the period of two (2) years on the First Count of the Indictment, and be imprisoned for the period of three (3) years on the Second Count of the Indictment; term of imprisonment imposed on the Second Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on the First Count of the Indictment; and be imprisoned for the period of two (2) years on the Third Count of the Indictment; and be imprisoned for the period of three (3) years on the Fourth Count of the Indictment; term of imprisonment imposed on defendant on the Fourth Count to commence and run from and after the expiration of the term of imprisonment imposed on said defendant on Third Count of the Indictment;

Further Ordered that terms of imprisonment imposed on defendant on the Third and Fourth Counts run Concurrently with those imposed on defendant on Counts One and Two of the Indictment; Further ordered that defendant pay a fine to the United States of America of One Hundred Dollars (\$100.00) on each of Counts numbered Two and Four of the Indictment.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer

and that the same shall serve as the commitment herein. Examined by

/s/ LOUIS E. GOODMAN,
United States District Judge.
JAMES T. DAVIS,
Asst. U. S. Attorney.

The Court recommends commitment to Federal Penitentiary.

Filed and Entered this 12th day of June, 1946.
C. W. Calbreath, Clerk.

Entered: Vol. 37, Page 340, Judgment Book. [9]

[Title of District Court and Cause.]

MOTION TO CORRECT JUDGMENT
AND SENTENCE

Comes now the defendant, Albert Adelman, by and through his attorney, A. J. Zirpoli, and respectfully moves the above-named Court to correct and set aside the judgment and sentence imposed on Counts I and III of the above entitled cause upon the following grounds:

1. That the said sentence was imposed in violation of the Constitution and laws of the United States.
2. That the said Court was without jurisdiction to impose sentence on Counts I and III of the indictment.
3. That Counts I and III of the indictment upon which said sentence was imposed are and each of them is void.

4. That Counts I and III of the indictment fail to state facts sufficient to constitute an offense against the United States.

Said motion will be made upon all the papers and records [10] on file herein.

Dated October 21, 1948.

A. J. ZIRPOLI,
Attorney for Defendant.

[Endorsed]: Filed Oct. 21, 1948.

[11]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO CORRECT
JUDGMENT AND SENTENCE

The motion is to correct the judgment and sentence of June 12, 1946, by vacating the sentences imposed under Counts I and III of the indictment (Harrison Narcotic Act 26 U.S.C. 2553, 2557) upon the ground that these Counts do not charge a legal offense against the United States.

I am of the opinion that Counts I and III do charge an offense against the United States.

The Congress has power to tax a prohibited import and hence the charge is valid. U. S. v. Yuginovich, 256 U. S. 450, 463.

The argument that the Jones Miller Act of 1922 (21 [12] U.S.C. 174) repealed by implication the tax on smoking opium previously imposed by the Harrison Narcotic Act, is not, in my opinion, good. McCool v. Smith, 66 U. S. 459, 470; United States

v. Tynen, 78 U. S. 88, 92; Frost v. Wenie, 157 U. S. 46, 58; United States v. Greathouse, 166 U. S. 601, 605; United States v. Yuginovich, 256 U. S. 450, 463; United States v. Noce, 268 U. S. 613, 617; Posadas v. National City Bank, 296 U. S. 497, 503; United States v. Jackson, 302 U. S. 628, 631; United States v. Borden Co., 308 U. S. 188, 198; United States Alkali Ass'n v. U. S. 325 U. S. 196, 209.

The motion is denied.

Dated November 24, 1948.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Nov. 26, 1948.

[13]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Albert Adelman, United States Penitentiary, McNeil Island, Washington.

Name and Address of Appellant's Attorney: A. J. Zirpoli, 1101 Balfour Building, San Francisco, California.

Offense: Count 1 of Indictment—Violation of 26 U.S.C.A. Sections 2553, 2557 (Harrison Narcotic Act) by unlawfully selling, dispensing and distributing not in and from the original stamped package a lot of smoking opium.

Count 3 of Indictment—Violation of 26 U.S.C.A. Sections 2553, 2557 (Harrison Narcotic Act) by

unlawfully selling, dispensing and distributing not in and from the original stamped package a lot of smoking opium.

Concise Statement of Judgment or Order Giving Date and Any Sentence: This appeal is from the order of Honorable Louis E. Goodman, United States District Judge of the above-entitled Court, made on November 24, 1948, and entered and filed on November 26, 1948, denying appellant's motion to correct the judgment and [14] sentence of June 12, 1946, by vacating the sentences imposed under Counts 1 and 3 of the indictment.

Name of Institution where now Confined, if not on Bail: The appellant, Albert Adelman, is now confined in the United States Penitentiary at McNeil Island, Washington.

The above-named appellant hereby appeals to the United States Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, November 30, 1948.

A. J. ZIRPOLI,
Attorney for Appellant.

[Endorsed]: Filed Dec. 3, 1948.

[15]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL AND STATEMENT OF POINTS ON WHICH HE INTENDS TO RELY ON APPEAL

Comes now the appellant and hereby designates the following portions of the record, proceedings

and evidence to be contained in the record on appeal:

1. The indictment.
2. Minutes of April 4, 1946, showing plea of not guilty by the defendant.
3. Minutes of June 11, 1946.
4. The verdict.
5. Judgment and commitment.
6. Motion to correct judgment and sentence.
7. Order denying motion to correct judgment and sentence.
8. Notice of appeal.
9. Appellant's designation of contents of record on appeal and statement of points on which he intends to rely on appeal. [16]

The following constitutes a concise statement of the points on which appellant intends to rely on appeal:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

Dated San Francisco, California, November 30, 1948.

A. J. ZIRPOLI,
Attorney for Appellant.

[Endorsed]: Filed Dec. 3, 1948.

[17]

District Court of the United States,
Northern District of California.

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to . . ., inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of The United States of America, vs. Albert Adelman, No. 30076-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$1.70 and that the said amount

has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 15th day of December, A.D. 1948.

(Seal)

C. W. CALBREATH,

Clerk.

[18]

[Endorsed]: No. 12128. United States Court of Appeals for the Ninth Circuit. Albert Adelman, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 15, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit.

No. 12128

ALBERT ADELMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF (RULE 19)

Comes now the appellant in the above-entitled appeal and presents his statement of points on appeal and designates the portions of record he considers necessary for the consideration thereof.

POINTS ON APPEAL

Appellant herewith presents the following as the statement of points on which he intends to rely on the appeal:

I.

That the Court erred in its order of November 24, 1948, denying appellant's motion to correct the judgment and sentence.

II.

That the judgment and sentence of June 12, 1946, on the first count of the indictment is void.

III.

That the judgment and sentence of June 12, 1946, on the third count of the indictment is void.

IV.

That the first count of the indictment fails to allege an offense against the United States.

V.

That the third count of the indictment fails to allege an offense against the United States.

**DESIGNATION OF PARTS OF RECORD
NECESSARY FOR CONSIDERATION
THEREOF**

Appellant herewith designates the entire transcript of the Clerk's record from the Court below and docketed herein as necessary for the consideration of his appeal.

The foregoing statement of points on appeal and designation of record which appellant deems necessary for a consideration of said appeal is respectfully presented and filed in compliance with Rule 19, Subdivision 6 of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit.

/s/ A. J. ZIRPOLI,
/s/ JOHN L. SULLIVAN,
Attorneys for Appellant.

[Endorsed]: Filed December 20, 1948. Paul P. O'Brien.